IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1973

No.

GARRELL S. MULLANEY, ET AL.,
Petitioners

v.

STILLMAN E. WILBUR, JR.
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT
IN OPPOSITION

HERBERT H. SAWYER
BERNSTEIN, SHUR, SAWYER
& NELSON
ONE MONUMENT SQUARE
PORTLAND, MAINE 04111

PETER J. RUBIN
BERNSTEIN, SHUR, SAWYER
& NELSON
ONE MONUMENT SQUARE
PORTLAND, MAINE 04111
OF COUNSEL

TABLE OF CONTENTS

Page

Citations i

Questions Presented 2

Statutory Provisions 2

Statement of the Case 3

Reasons to Deny the Writ 8

1. IN RE WINSHIP CLEARLY REQUIRES THE STATE TO PROVE OR DISPROVE THE FACTUAL ISSUES OF HEAT OF PASSION AND SUDDEN PROVOCATION BEYOND A REASONABLE DOUBT BECAUSE THEY ARE ESSENTIAL FACTORS RELATING TO A DEFENDANT'S CONVICTION OF MANSLAUGHTER OR MURDER AND, THEREFORE, NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED 8

2. THE TRIAL COURT'S CHARGE VIOLATES THE STATE LAW REQUIREMENTS CONTAINED IN STATE V. LAFFERTY AND, THEREFORE, THE JUDGMENT BELOW IS SUPPORTABLE ON INDEPENDENT STATE GROUNDS, THUS RENDERING THE CONSTITUTIONAL ISSUES NOT APPROPRIATE FOR REVIEW BY THIS COURT 13

Conclusion 17

CITATIONS

CASES

Commonwealth v. O'Neal, 441 Pa. 17, 271 A.2d 497 (1970) 9

In Re Winship, 397 U.S. 358 (1970) 8, 10

People v. Morrin, 51 Mich. App. 301, 187 N.W.2d 434 (1971) 9

State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971) 9

State v. Ferris, 249 A.2d 523 (Me. 1969) 11

State v. Lafferty, 309 A.2d 647 (Me. 1973) 7, 15

State v. Merry, 136 Me. 243 (1939) 15

State v. Neal, 37 Me. 468 (1854) 15

State v. Wilbur, 278 A.2d 139 (Me. 1971) 16

United States v. Carrol, 436 F.2d 272 (D.C. Cir. 1970) 11

STATUTES

17 M.R.S.A. §2551 (1964) 3

17 M.R.S.A. §2651 (1964) 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

GARRELL S. MULLANEY, ET AL.,
Petitioners

v.

STILLMAN E. WILBUR, JR.,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION T
PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FO
THE FIRST CIRCUIT.

The Respondent, Stillman E. Wilbur, J
respectfully prays that the petition for a Writ
Certiorari to review the judgment and opinion
the United States Court of Appeals for the Fir
Circuit entered on April 30, 1974, be denied

Petitioners adequately set forth the citatio to the opinions below and the jurisdiction of this Court in their petition.

QUESTIONS PRESENTED

1. . Is it a violation of Due Process of L to create a presumption of malice aforethought i murder case and to place the burden of proof on Defendant to prove by a preponderance of the e dence that there was no malice aforethought and that the killing was done in the heat of passion a sudden provocation so as to reduce the crime committed from murder to manslaughter?

STATUTORY PROVISIONS

Maine Revised Statutes, Title 17:

§2651. Definition (MURDER)

Whoever unlawfully kills a human being malice aforethought, either express or implied, guilty of murder and shall be punished by impr ment for life.

§2551. Definition (MANSLAUGHTER)

Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, or, being under the legal duty to care and provide for any child or other person, willfully fails or neglects to provide for such child or other person necessary food, clothing, treatment for the sick or other necessities of life, thereby causing or hastening the death of such child or other person, or commits manslaughter as defined by the common law, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years, except that if there is a violation of Title 29, Sections 1315 or 1316, no prosecution for manslaughter shall lie.

STATEMENT OF THE CASE

The Petitioners' statement of the case needs to be amplified in certain respects.

The progression of the State trial judge's charge makes it quite clear that he instructed the jury that, when the State has proven an unlawful killing, there arises a presumption of malice aforethought which the jury must accept unless the Respondent proves that there was no malice aforethought because the killing took place in the heat of passion upon sudden provocation.

On Page 526 of the Jury Charge, the judge charged:

> . . . if you find the State has proven beyond a reasonable doubt that the Defendant committed a homicide, (you may) decide whether the homicide was murder or manslaughter.

The trial judge went on to say that the State must prove, beyond a reasonable doubt, that the victim is dead, that he was killed, that the killing took place in Franklin County, that the death took place on January 30, 1966, that the Defendant killed the victim, and, "finally" (Jury Charge, p. 530), that it was an unlawful killing. (Jury Charge, p. 526-30.)

Nowhere in those five pages does the judge say that the State must prove malice aforethought beyond a reasonable doubt or, in other words, the lack of heat of passion upon sudden provocation. In effect, he was saying that if the jury is satisfied, beyond a reasonable doubt, of the facts enumerated

above, then the State has satisfied its burden of proving beyond a reasonable doubt that a crime has occurred and then different rules apply for the jury to determine whether the crime is murder or manslaughter.

After explaining the difference between murder and manslaughter and defining malice aforethought, the trial court instructed the jury as follows:

> Malice aforethought is presumed to be present in all homicides until the contrary appears from circumstances of alleviation to be made out by the Defendant, or arising out of the evidence produced in the case. (Jury Charge, p. 538.)

The Court placed the burden of proof on the Defendant to establish the lack of malice aforethought by a preponderance of the evidence by showing that the killing occurred in the heat of passion upon sudden provocation.

Furthermore, the court charged the jury that it must find the Defendant guilty of murder if he does not satisfy his burden of proof.

> . . . if the unlawful killing was proved by the State beyond a reasonable doubt, and if there was nothing in the circumstances to explain anything palliating, then you'd find the Defendant guilty of murder, because it would be presumed to have been done with malice aforethought. (Jury Charge, p. 540-41.) (Emphasis added.)

Thus, the court charged the jury that the presumption is rebuttable initially but becomes conclusive absent any facts to the contrary. Thus, it is clear that the court did not charge the jury that only an inference is created which, in its sole discretion, the jury may or may not adopt.

It is Respondent's contention that this charge violated the Fourteenth Amendment.

The Honorable Edward T. Gignoux, United States District Court Judge for the District of Maine, upheld Respondent's contention.

The First Circuit Court of Appeals affirmed Judge Gignoux's ruling in a very perceptive opinion which reviews the history of law in Maine.

After this Court remanded this case to the First Circuit Court of Appeals, for further consideration in light of State v. Lafferty, 309 A.2d 647 (Me. 1973), the First Circuit affirmed its earlier decision, but on different grounds. The First Circuit turned the last paragraph of its first decision from dictum into holding. In its first decision, the First Circuit had stated that even accepting the Maine Court's premise, a serious question is presented "whether a formula which imposed on the defendant a factual issue determinative of the length of sentence would be any more acceptable than when used to establish an element of the crime." As the First Circuit explained in its decision on remand, the issues of "heat of passion","causation" and "sudden and

adequate provocation" are clearly factual issues necessary to a finding of manslaughter and it is a violation of due process to impose the burden of proof as to those issues on a defendant.

REASONS TO DENY THE WRIT

1. IN RE WINSHIP CLEARLY REQUIRES THE STATE TO PROVE OR DISPROVE THE FACTUAL ISSUES OF HEAT OF PASSION AND SUDDEN PROVOCATION BEYOND A REASONABLE DOUBT BECAUSE THEY ARE ESSENTIAL FACTORS RELATING TO A DEFENDANT'S CONVICTION OF MANSLAUGHTER OR MURDER AND, THEREFORE, NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

This Court held, in In re Winship, 397 U.S. 358, 364, the following:

> . . . we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Every court, since Winship, other than the Maine Court, that has considered the question of placing the burden of proof on the defendant to rebut the

presumption of malice aforethought and to prove heat of passion upon sudden provocation has recognized that the holding of Winship renders the presumption unconstitutional. State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971); People v. Morrin, 51 Mich. App. 301, 187 N.W.2d 434 (1971); Commonwealth v. O'Neal, 441 Pa. 17, 271 A.2d 497, 499 n.1 (1970). In Morrin, the court said:

> The prosecution must always prove the defendant guilty beyond a reasonable doubt; a rule of law that shifts the burden of proof with respect to "malice" tends to cloud the dimensions of the prosecutor's ultimate burden. 187 N.W.2d at 442.

In order to determine whether the issue on the merits presents a substantial federal question, it is necessary to examine the relationship of the Maine's Court analysis to the rationale underlying Winship.

The Maine Court has said that "malice aforethought", "heat of passion" and "sudden provocation" are only relevant to the punishment which is pronounced. However, it is still a jury function and

not a court function to decide the question of whether those facts existed at the time of the act. Such findings are fundamental and essential to a determination that a person is guilty of murder or manslaughter. Because of the interpretation adopted by the Maine Court, the process of determining the existence of the above factors is not in any way similar to the other matters relevant to the sentencing process. A finding of heat of passion, sudden provocation or malice aforethought is just as crucial to the ultimate resolution of the case as any element of the crime.

This Court, in explaining the rationale behind the ruling in Winship explained:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. 397 U.S. at 363.

A conviction of murder certainly results in a greater stigma than a conviction of manslaughter and

also results in a longer sentence.[1] The sentencing process under the circumstances of this case, as articulated by the Maine Court, is fundamental to the criminal process. The underlying purpose of Winship is applicable to the issues of malice aforethought, heat of passion and sudden provocation even in the context given to the concepts by the Maine Court. Where a part of the sentencing process is an integral part of the criminal process and one's personal liberty is "vitally affected", due process requires that the Defendant have no burden of persuasion. Cf. United States v. Carrol, 436 F.2d 272 (D.C. Cir. 1970).

---

[1] In State v. Ferris, 249 A.2d 523 (Me. 1969), the Maine Court held that even though the matter of aggravation in an assault and battery case is only relevant to the question of punishment, it can have a significant impact on the sentence that a defendant receives. Therefore, the issue should be decided by a jury and the state should have the burden of proving aggravation beyond a reasonable doubt. Thus, in another area, the Maine Court has applied the Winship standard to a question of punishment.

As the Court below stated in its opinion:

> Whether a defendant is to be regarded as a murderer, to spend his life in prison, or, as guilty of manslaughter, is to serve a term of years, with the possibility of parole--or possibly only fined--depends upon the absence, or existence, of certain facts. We cannot accept that simply by calling them "reductive factors" the determination of these facts occurs other than "during a criminal prosecution." Were it otherwise, the important interests that concerned the Court in Winship could be diluted to whatever degree judicial or legislative draftsmen might elect.

The implications of not applying Winship to this case are far reaching. If the State succeeds in its contention, then there is nothing to stop a state from defining its crimes in such a way as to remove those elements always thought to be an element of the crime and thus frustrate the fundamental principles of our criminal justice system.[2]

---

[2] It is interesting to note that if a person is only charged with voluntary manslaughter, then the State must prove that the killing took place in the heat of passion upon sudden provocation. Under these circumstances, heat of passion and sudden

Thus, it appears that Winship is clearly applicable to the facts of this case even under the construction adopted by the Maine Court. The issue does not present a substantial Federal question.

2. THE TRIAL COURT'S CHARGE VIOLATES THE STATE LAW REQUIREMENTS CONTAINED IN STATE V. LAFFERTY AND, THEREFORE, THE JUDGMENT BELOW IS SUPPORTABLE ON INDEPENDENT STATE GROUNDS, THUS RENDERING THE CONSTITUTIONAL ISSUES NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The trial court charged the jury that "the State must prove that the killing was an intentional killing." (Jury Charge, p. 528.) The court addressed the question of intention briefly and then said, "and I am going to leave for now my

---

provocation must be proved by the State. However, when the State charges a person with murder, it is trying to place the burden of proof on a defendant to prove those factual matters in order to reduce the crime to manslaughter. The State could always avoid assuming the burden of proof by charging murder in every case and making the defendant prove it was manslaughter rather than only charging manslaughter and thus having the burden of proof on heat of passion and sudden provocation.

suggestion--my language concerning what the jury finding of what the defendant intended. I will be back to that later." (Jury Charge, p. 530.)

Eventually, the court redirects its attention to the requirement of intention by discussing the concept of "malice aforethought" which it defines for the jury as being either a "premeditated design to kill" (express malice) (Jury Charge, p. 535), or "any deliberate cruel act committed by one person against another suddenly or without a considerable provocation" (implied malice) (Jury Charge, p. 538). However, the court then says:

> Malice aforethought is presumed to be present in all homicides until the contrary appears from circumstances of alleviation to be made out by the defendant. (Jury Charge, p. 538.)

Thus, the requirement of intention as defined by express or implied malice is presumed until the contrary is shown by the defendant.

In State v. Lafferty, supra, the Maine Supreme Court, through the concurring opinion of Justice Wernick, defines "intentional" as being the subjective intent to kill or such actions which, when objectively viewed, have a high death producing potential. He separates this definition of intention from the concept of malice aforethought. In other words, he has transferred what has historically been included in the concept of malice aforethought to a separate and distinct concept of intention. Compare State v. Lafferty, supra with State v. Merry, 136 Me. 243, 248 (1939); State v. Neal, 37 Me. 468, 469-70 (1854).

Thus, pursuant to Justice Wernick's analysis, the State must prove beyond a reasonable doubt that there was a subjective intent to kill (premeditation) or, when objectively viewed, actions with a high death producing potential.

However, in the trial court's charge in this case, the court charged that said intent, which was encompassed within the term "malice aforethought", was to be presumed until the Defendant proved otherwise. In doing so, the trial court violated the requirements set forth by Justice Wernick in Lafferty, supra. Since the independent concept of intention as announced in Lafferty was included historically within the concept of malice aforethought, the Maine Supreme Court had no occasion to discuss the issue separately in its original decision of State v. Wilbur, 278 A.2d 139 (Me. 1971). Because the trial court violated the state law rules set forth in Lafferty, the judgment of the First Circuit is correct on the basis of state law alone. Thus, it would be inappropriate for this Court to grant certiorari and decide constitutional issues which are not necessary to the resolution of the case.

CONCLUSION

For all of the above reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Herbert H. Sawyer, Esq.
Bernstein, Shur, Sawyer
and Nelson
One Monument Square
Portland, Maine 04111

Peter J. Rubin, Esq.
Bernstein, Shur, Sawyer
and Nelson
One Monument Square
Portland, Maine 04111
Of Counsel

CERTIFICATE OF SERVICE

Pursuant to the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondent, on the date written below, did deposit a copy of the above brief in opposition to the petition for a Writ of Certiorari in the United States Post Office at Portland, Maine, first class postage prepaid, addressed to Petitioner's attorney as follows: Richard S. Cohen, Esquire, Deputy Attorney General, State House, Augusta, Maine, 04330.

Dated: August 20, 1974.

Herbert H. Sawyer, Esq.
Bernstein, Shur, Sawyer
and Nelson
One Monument Square
Portland, Maine 04111